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Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 4, 2008

The Honorable Carol Wood
Administrative Law Judge
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 AUG -4 PM 3:41
CHIEF CLERKS OFFICE

RE: **CITY OF GALVESTON**
SOAH DOCKET NO. 582-07-3473
TCEQ DOCKET NO. 2008-1037-UCR

Dear Judge Wood:

Enclosed for filing is the Public Interest Counsel's Response to Certified Question submitted by Administrative Law Judge in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script, reading "Scott A. Humphrey".

Scott A. Humphrey
Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

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SOAH DOCKET NO. 582-07-3473
TCEQ DOCKET NO. 2008-1037-UCR

2008 AUG -4 PM 3:42

PETITION OF THE FLAGSHIP HOTEL,	§	BEFORE THE	CHIEF CLERKS OFFICE
LTD. TO REVIEW CITY OF GALVESTON'S	§	TEXAS COMMISSION	
DENIAL OF A REQUEST TO REFUND	§	ON ENVIRONMENTAL	
PAST DUE WATER BILLS	§	QUALITY	

**OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO
CERTIFIED QUESTION SUBMITTED BY ADMINISTRATIVE LAW JUDGE**

TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or the Commission) responds to the following Certified Question submitted by the Administrative Law Judge (ALJ) from the State Office of Administrative Hearings (SOAH) in the above-referenced matter: Whether the Commission, pursuant to § 13.042(d), has exclusive jurisdiction to review orders of a governing municipality, including those orders pertaining to the municipality's own water and sewer service customers.

I. INTRODUCTION

According to the ALJ, this matter grows out of a dispute between the Flagship Hotel, Ltd. (Flagship or Petitioner) and the City of Galveston (City or Galveston) that spans for nearly twenty years. In 1963, the City and Nide Corporation (Nide) entered into a lease agreement under which the City was to construct a hotel on the pier and then lease the hotel and the pier to Nide. The hotel was built, and after a series of assignments, Flagship became the lessee in January 1990.

After taking over the hotel, Flagship began receiving water service bills from the City that were far in excess of the bills that the previous lessee had received. In January 1991, Flagship's

chief engineer sent the City a list of needed repairs, including fixing major leaks in the water lines to the hotel. The Petitioner alleges that, because the City had neither the funds nor the expertise to perform the needed repairs, the city manager agreed to adjust Flagship's water service bills to account for overcharges for the water lost as a result of the leaks and for sewage treatment not being used.

In 1996, the City notified Flagship that it did not consider the adjustment authorized by the now former city manager to be legal or valid. In March 1998, the City sent Flagship a final notice demanding payment of \$196,291.15. In September 1998, Flagship sued the City for breach of the parties' lease agreement.

On March 21, 2001, the City notified Flagship that water service would be disconnected in 24 hours if Flagship did not pay the delinquent bill. On March 22, 2001, Flagship amended its lawsuit against the City, seeking a temporary injunction restraining the City from disconnecting water service. The district court in Galveston County granted Flagship's petition and enjoined the City from disconnecting the water service. The City appealed.

On March 14, 2002, the First Court of Appeals in Houston held that the district court did not have jurisdiction to enter an order enjoining the City from disconnecting the hotel's water service and that exclusive appellate jurisdiction over the City's final disposition of this dispute rested with the Commission.¹ On March 15, 2002, the City issued another 24-hour disconnection notice and demanded Flagship pay \$215,920.15. On March 18, 2002, Flagship filed a request with the TCEQ for an emergency order enjoining the City from ceasing water service, pending

¹ *City of Galveston v. Flagship Hotel, Ltd.*, 73 S.W.3d 422, 427 (Tex. App-Houston [1st Dist.] 2002, pet. denied), hereinafter *Flagship I*.

resolution of the dispute. Petitioner alleges that TCEQ staff informed Flagship the Commission did not have jurisdiction over the matter. Therefore, the Petitioner paid the City the requested amount under protest.

On March 27, 2002, the Galveston County district court ruled on competing motions for summary judgment in the lawsuit between Flagship and Galveston over the lease term and interpretation of the repair obligations under the lease. The court, citing the First Court of Appeals decision, held it did not have jurisdiction to hear the dispute over the adjustment of Flagship's water bills.

In April 2002, Flagship requested the City refund the money it paid under protest. Galveston denied the request. On October 23, 2002, Flagship filed with the Commission a petition for review of the City's denial of Flagship's application for refund of the money.

In October 2003, The Texarkana Court of Appeals affirmed the district court's holding that it had no jurisdiction over the dispute between Flagship and Galveston to adjust Flagship's water bills.² The Sixth Court of Appeals found persuasive the reasoning of the First Court of Appeals in *Flagship I* and held that the Water Code granted the Commission exclusive appellate jurisdiction over the dispute.

In July 2004, Flagship filed for Chapter 11 bankruptcy protection. In July 2005, Flagship filed an adversarial proceeding in the bankruptcy court, seeking a turnover order for the funds that Flagship had paid to Galveston to avoid disconnection of the hotel's water service. In February 2007, the bankruptcy court abated the adversarial proceeding and ordered Flagship to

² *Flagship Hotel, Ltd. v. City of Galveston*, 117 S.W.3d 552 (Tex. App.—Texarkana 2003, pet. denied), hereinafter *Flagship II*.

liquidate its claims against the City in the appropriate forum before it could seek a turnover order. On April 4, 2007, Flagship filed its amended petition with the Commission.

II. RESPONSE

A. Classification of the Utility

Since there is a myriad of different entities that provide water service, it is important to classify what type of utility Galveston is before determining whether we have appellate jurisdiction over this matter. Galveston is a municipally owned utility, defined under Tex. Water Code § 13.002(13) as any utility owned, operated and controlled by a municipality whose directors are appointed by one or more municipalities. Galveston also qualifies as a retail public utility as defined by Tex. Water Code § 13.002(19) because retail public utilities include municipally owned utilities. However, the City does not fall under the definition of water and sewer utility, public utility or utility as set out in Tex. Water Code § 13.002(23) because municipal corporations are specifically excluded from those definitions. Therefore, Galveston is a municipally owned utility and a retail public utility, but not a water and sewer utility, public utility or utility.

B. Commission's Jurisdiction Over a Municipality

The Commission's jurisdiction over municipalities is set out in Tex. Water Code § 13.042. According to § 13.042(a), the governing body of each municipality has exclusive original jurisdiction over all water, sewer and utility rates, operations and services provided by a water and sewer utility within its corporate limits. The commission shall have exclusive appellate jurisdiction to review orders and ordinances of those municipalities as provided in this chapter [Tex. Water Code § 13.042(d)]. Taken in context together, OPIC concludes that if a

water and sewer utility operates within the corporate limits of a municipality, the municipality has original jurisdiction but the Commission has appellate jurisdiction. In this case, however, the Commission would not have appellate jurisdiction based on these portions of the statute because, as described *supra*, Galveston is not a water and sewer utility.

OPIC's position is further supported by § 13.042(f), which specifically states that this subchapter does not give the Commission power or jurisdiction to regulate or supervise the rates or service of a utility owned or operated by a municipality, directly or through a municipally owned corporation, within its corporate limits or to affect or limit the power, jurisdiction or duties of a municipality that regulates land and supervises water and sewer utilities within its corporate limits, except as provided by this code. Therefore, if we are to conclude that the Commission has appellate jurisdiction over this matter, this jurisdiction must be found elsewhere.

The Commission's appellate jurisdiction is described in § 13.043, and § 13.043(a) states that any party to a rate proceeding before the governing body of a municipality may appeal the decision of the governing body to the Commission. However, this subsection does not apply to this case because the statute specifically states that this subsection does not apply to a municipally owned utility.

This exclusion is further supported by § 13.043(b), which enumerates which ratepayers may appeal which decisions of what governing bodies of what entities. Only § 13.043(b)(3) identifies a situation in which a decision of a municipally owned utility can be appealed, and that is when the ratepayers in question reside outside the corporate limits of the municipality. Since the statute makes clear that only ratepayers outside the corporate limits may appeal decision of

the municipality, it stands to reason that those ratepayers within the corporate limits cannot avail themselves to the Commission's appellate jurisdiction. OPIC has no information that Flagship is located outside the corporate limits of Galveston.³

Therefore, based on the specific exclusions identified in § 13.042(d) and (f) and the lack of inclusion of the Commission's appellate jurisdiction for this matter as set out in § 13.043, OPIC concludes that the Commission does not have exclusive jurisdiction to review orders of a governing municipality, including those orders pertaining to the municipality's own water and sewer service customers. The only remaining matter is to square this conclusion with the previous Commission decision in a similar matter and the *Flagship* decisions from the appellate courts.

C. The Victoria Palms Case

The Commission has previously ruled on a similar case involving the Victoria Palms resort and the City of Donna.⁴ In that case, Victoria Palms was seeking the Commission's appellate jurisdiction to require the City of Donna to return approximately \$200,000 in overcharges due to a faulty meter and to stop the City from collecting an additional \$97,500 in additional overcharges. The ALJ in that case concluded that he and the Commission lacked the jurisdiction to hear that case because the utility was operated by a municipality and that Victoria Palms was not one of the ratepayers who could seek the Commission's appellate jurisdiction as set out in Tex. Water Code § 13.043. The Commission agreed that it did not have jurisdiction in

³ If subsequent information were provided showing that Flagship was indeed outside the corporate limits of Galveston, OPIC would reconsider its recommendation.

⁴ TCEQ Docket No. 2003-0697-UCR; SOAH Docket No. 582-04-0252

the Victoria Palms case.

D. The *Flagship* Decision in the Court of Appeals

The First Court of Appeals in Houston determined in the *Flagship I* case that the Commission did have jurisdiction to hear this matter.⁵ The appellate court relied in part on Tex. Water Code § 13.042(d) as vesting appellate jurisdiction on the Commission as well as § 13.001, which state the general legislative purpose “to assure rates, operations and services that are just and reasonable to the consumers and the retail public utilities.”⁶

OPIC respectfully disagrees with the appellate court’s interpretation. As stated above, sections (a) and (d) taken together limit the Commission’s review to decisions with respect to water and sewer utilities. Galveston is not a water and sewer utility; therefore, the Commission’s appellate jurisdiction cannot arise from that subsection.

The Court did not look any further to determine whether appellate jurisdiction existed based on § 13.043. Since there is no analysis of that subsection from the appellate court, OPIC has nothing with which to compare its analysis. Therefore, OPIC does not agree with the appellate court’s conclusion regarding the Commission’s jurisdiction in this matter.

III. CONCLUSION

OPIC recommends responding to the Certified Question as follows: the Commission does not have exclusive jurisdiction to review orders of a governing municipality, including those orders pertaining to the municipality’s own water and sewer service customers. This decision is


⁵ OPIC notes that neither the State nor the Commission was a party to this case. Therefore, OPIC concurs with the ALJ in the *Victoria Palms* case that the Commission is not bound by that decision.

⁶ *Flagship I* at 422.

consistent with the Commission's order in the *Victoria Palms* case. In arriving at this recommendation, OPIC disagrees with the First Court of Appeals decision in the *Flagship I* case.


Respectfully submitted,

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By 
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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2008 the original and eleven copies of the foregoing was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.


Scott A. Humphrey

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**MAILING LIST
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